No. 734

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In the Supreme Court of the United States

October Term, 1945.

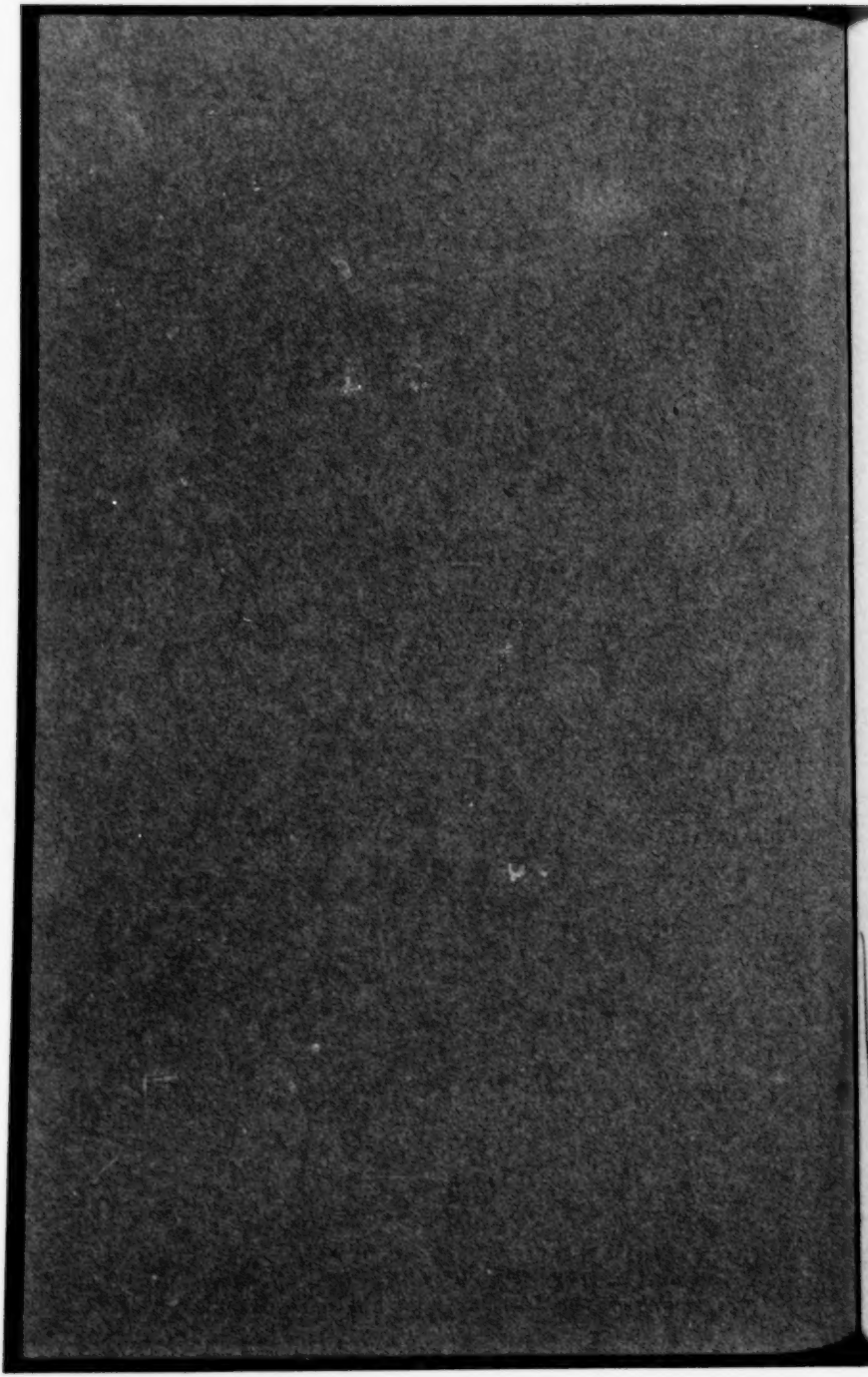
MISSION STATE BANK, a Corporation, *Petitioner*,

vs.

CHARLES EUGENE SPURGEON, by his next friend, Thomas L. Brown, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT.

COWGILL & POPHAM,
A. C. POPHAM,
SAM MANDELL,
PRICE WICKERSHAM,
2306 Fidelity Bldg.,
Kansas City, Mo.,
Counsel for Petitioner.



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CHARLES EUGENE SPURGEON, by his next friend, Thomas L. Brown, *Respondent.*

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, the Mission State Bank of Mission, Kansas, respectfully presents this petition for review on writ of certiorari of the decision of the United States Circuit Court of Appeals, Eighth Circuit (42-49), rendered November 6, 1945, in the case of *Charles Eugene Spurgeon, by his next friend, Thomas L. Brown, Appellant,* vs. *Mission State Bank, a Corporation, Appellee,* No. 13102, 151 F. (2d) 762. On appeal from the District Court,

the sole issue before the Circuit Court of Appeals was the question of diversity of citizenship as affecting federal jurisdiction, and the case turned on the right of a minor to acquire a domicile of his own choice in the State of Kansas, separate and apart from that of his parents, who resided in Missouri.

The case was ruled by the Circuit Court of Appeals, as appears from its opinion, our summary statement, reasons relied on for allowance of the writ and brief, which follow, not on the controlling common law of Missouri, which the Circuit Court of Appeals was under a duty to apply, but on the modern trend or modern general law as perceived by the Circuit Court of Appeals. Therefore, among our grounds for applying for review on writ of certiorari are the identical grounds for which the writ was allowed in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

SUMMARY STATEMENT.

January 23, 1943, Charles Eugene Spurgeon, a minor, by next friend, filed his action for damages for false imprisonment against the petitioner, Mission State Bank, in the Circuit Court of Jackson County, Missouri, at Kansas City (2-7). The bank, a Kansas corporation and citizen and resident of that state, in due time filed its petition for removal to the United States District Court (6-8), alleging that plaintiff minor was a citizen and resident of Missouri, so that necessary diversity of citizenship existed. Bond was filed, and an order of removal was entered by the state court (9). Transcript on removal was duly lodged in the District Court (10), and the bank then answered (10-11).

April 16, 1943, plaintiff filed his motion to remand (11-12) in which he alleged that he, as well as the bank, was citizen and resident of Kansas, and that no diversity of citizenship existed between them. The motion was heard before District Judge Reeves. We briefly summarize the testimony before the District Court on the hearing:

Plaintiff Charles Eugene Spurgeon, hereinafter referred to as the minor, was born July 2, 1924. His parents resided near Queen City in Schuyler County, Missouri. His father died in 1926. Six years later his mother remarried, becoming Sarah Catherine Ballanger, and she continued to reside in Schuyler County. In December, 1942, the minor, then about 18 years old, left his mother's home and went to Kansas City, Missouri, to seek employment (15-16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave (17).

On reaching Kansas City, Missouri, the minor took board and lodging at the home of a Mrs. Poindexter. He had no extra clothes with him. He told Mrs. Poindexter he expected to be drafted at any time. He obtained employment at the Dickinson Theatres at Mission, Kansas, a close-in suburb of Kansas City, Missouri, and commuted back and forth until January 10, when he left Mrs. Poindexter's home (25).

January 2, 1943, the minor was arrested while in the bank, and was later released. He claimed that on January 10, 1943, he moved his residence to Mission, Kansas, with the intent to become a citizen and resident of that state (13). He slept in a small, unfurnished room in the theatre building from January 10, 1943, until March of that year when he was inducted (25).

The minor contended that the evidence showed he had been emancipated, so that he was legally capable of acquiring a domicile of choice, separate and apart from the domicile of his parents. The bank contended that under the law of Missouri, no minor, whether emancipated or not, could acquire a domicile of his own choice so long as either parent lived, and, further, that complete emancipation was not shown.

The District Court, in an able memorandum opinion (26-36), 55 Fed. Supp. 305 (Appendix "A"), held that as a matter of fact, complete emancipation was not shown, and ruled that the minor, being *sui non juris*, could not acquire a separate domicile of his choice under the law of Missouri, and the motion to remand was denied (32).

The cause proceeded to trial and plaintiff minor recovered judgment for actual and punitive damages (33-34). His appeal to the Circuit Court of Appeals, Eighth Circuit, in which he complained solely of jurisdiction of the District Court, followed, and that court, in its opinion

(42-49) (Appendix B), held that on the record, emancipation was shown as a matter of law and, ruling the case solely on the authority of foreign jurisdiction, held that the minor was legally capable of acquiring, and had acquired, a separate domicile of his own choice in Kansas, and that no diversity of citizenship existed. The Eighth Circuit reversed the cause with instructions to remand to the state court. After unavailing petition for rehearing (51-58), the bank presents this petition for review of the decision of the Eighth Circuit, on writ of certiorari.

JURISDICTION.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Appeals, Eighth Circuit, on writ of certiorari, is invoked under Section 240 (a) of the Judicial Code, as amended June 7, 1934, c. 246, 48 Stat. 926, 28 U. S. C. A. Sec. 347, and Rule 38 of the Supreme Court of the United States as effective February 27, 1939. The opinion of the Circuit Court of Appeals was delivered November 6, 1945 (42), and the petition for rehearing was denied December 3, 1945 (59). This petition for review on writ of certiorari is filed within three months of either date and is therefore timely filed. 48 Stat. 926, 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

I.

Since the question for decision turned on the common law of Missouri, was not the Circuit Court of Appeals in error in deciding the issue not on the common law of Missouri but on the law of foreign jurisdictions?

II.

Since the opinion of the Circuit Court of Appeals, Eighth Circuit, shows that its decision was based on what it terms the "modern authorities" which express new views not as yet adopted by the Missouri courts, did not that court act erroneously and contrary to the rule of this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, and *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168?

III.

Has the Circuit Court of Appeals authority to forecast changes in the common law of the State of Missouri and to change the common law of that state in accordance with such forecasts?

IV.

Does the decision of the Circuit Court of Appeals for the Eighth Circuit conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same subject matter in the case of *Delaware L. & W. R. Co.* v. *Petrowsky,* 2 Cir., 250 Fed. 554?

V.

Does the decision of the Circuit Court of Appeals conflict with this Court on the same matter in *Lamar* v. *Micou*, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751?

VI.

Can the Circuit Court of Appeals brush aside findings of fact made by a District Court and resting on substantial evidence, unless clear error appears?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Under the common law as adopted and in force in Missouri, no minor can acquire a separate domicile of his own choice so long as either parent is living. In its opinion the Circuit Court of Appeals acknowledges that no Missouri court has changed the common law rule, saying:

> "* * * The appellant in this case had reached an age of discretion, and established his competence to care for himself before he departed from the home of his parents. In such circumstances, modern authorities, preferring reality to fiction, sustain the right of an emancipated minor to acquire a domicil of his choice. 'An emancipated child can acquire a new domicil of choice. Since he has to provide for himself, he should have power to choose his home.' Restatement of Conflict of Laws, Sec. 31. To the same effect, 1 Beale, Conflict of Laws, Secs. 30.1, 31.1; Goodrich on Conflict of Laws, Sec. 34; Dobie, Federal Procedure, p. 191. See also 30 Columbia Law Review 703. There are no Missouri decisions directly on the point. On principle, however, the Missouri cases cited above point to agreement with the modern rule.
>
> "The cases in other States are in conflict. Where the right of an emancipated minor to select a domicil of his choice is denied, decision is usually based on the fact that a minor, being *non sui juris,* is legally incapable of effecting a change of domicil. Cases so holding are *Gulf, C. & S. F. R. Co.* v. *Lemons,* 109 *Tex.* 244, 206 S. W. 75, 5 A. L. R. 943; *Delaware, L. & W. R. Co.* v. *Petrowsky,* 2 Cir., 250 Fed. 554; and *Wiggins* v. *New York Life Ins. Co.,* 2 Fed. Supp. 365. Cases recognizing the rights of the minor are *Bjorn-*

> *quist* v. *Boston & A. R. Co.*, 1 Cir., 250 Fed. 929, 5 A. L. R. 951; *Woolridge* v. *McKenna*, C. C. Tenn., 8 Fed. 650; *Russell* v. *State*, 62 Neb. 512, 87 N. W. 344; and *Cohen* v. *Del. L. & W. R. Co.*, 269 N. Y. S. 667. The cases are noted in 5 A. L. R. 949. As stated in Goodrich on Conflict of Laws, Sec. 34(b), recognition of the right of an emancipated minor to choose a domicil 'merely gives legal effect to what is already the fact'." (48-49.)

The common law rule was laid down in *Delaware L. & W. R. Co.* v. *Petrowsky*, 250 Fed. 554, where the Circuit Court of Appeals, Second Circuit, said:

> "The law is well established that every person at his birth acquires a domicile of origin, which is that of the person on whom he is legally dependent, which in the case of a legitimate child is that of its father, and in the case of an illegitimate child is that of its mother.
>
> "The general rule is also well established that a person while a minor, being *non sui juris*, cannot change his or her domicile."

No Missouri court has expressly, or by implication, ruled that a minor can acquire a domicile of choice. No Missouri statute has changed the common law rule that a minor cannot acquire a domicile of choice. Therefore, the common law rule is still in effect in Missouri and it was the duty of the Circuit Court of Appeals to apply that rule, the common law rule alone, in deciding the case.

In *Erie R. Co.* v. *Tompkins, supra*, this Court laid down the rule, "Except in matters governed by the Federal Constitution or by Act of Congress the law to be applied in any case is the law of the state." The Circuit Court of Appeals failed and refused to follow the mandate of this

Court, and so committed error against your petitioner by deciding an important question of local law in a way in conflict with applicable local decisions and law, and on the express ruling of *Erie R. Co.* v. *Tompkins* this point alone constitutes a valid ground for allowance of the writ of certiorari.

II.

As shown by that portion of the opinion of the Circuit Court of Appeals which we have quoted above, that court ruled the appeal not on the applicable common law of Missouri, but on what it terms "modern authorities," and on cases from other jurisdictions. This constitutes another valid reason for the allowance of the writ of certiorari since it shows that the Circuit Court of Appeals has far departed from the accepted and usual course of judicial decision.

The Circuit Court of Appeals, Eighth Circuit, was bound to follow the mandate of this Court in *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168, in which this Court said:

> "The law of a state is embodied as well in its common law rules as in its statutes. * * * The extent to which it shall apply in its own courts a rule of law of another forum is itself a question of local law of the forum."

In its opinion the Circuit Court of Appeals not only attempts to forecast the future course of the Missouri courts with the subject, but also by judicial legislation seeks to make new law for Missouri.

We respectfully submit that under the latest controlling authorities of this Court above referred to, it was beyond the province of the Circuit Court of Appeals to forecast

changes in Missouri law or to make them. By law, the right to change the common law of Missouri rests entirely with the courts and Legislature of that state.

III.

An additional compelling reason for the allowance of the writ appears on the face of the opinion of the Circuit Court of Appeals, which concedes that its decision is in conflict with the decision of the Second Circuit on the same matter in the case of *Delaware L. & W. R. Co.* v. *Petrowsky, supra.* The fact that the Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter is a valid ground for allowance of the writ under Rule 38 of this Court.

IV.

The decision of the Circuit Court of Appeals is in conflict with the rule laid down in the last controlling decision of this Court in the case of *Lamar* v. *Micou*, 112 U. S. 452, 470, 5 S. Ct. 221, 28 L. Ed. 751, where this Court said:

"An infant cannot change his own domicile."

The opinion then goes on to say that as infants have the domicile of their father, he may change their domicile by changing his own and that on the death of the father the widow, by remarrying, does not change the domicile of the children, but that the children's domicile remains that of their father.

In our case the father was a resident of Schuyler County, Missouri, when he died, and although the mother remarried, her residence remained in Schuyler County,

Missouri, and Schuyler County, Missouri, under the very authority of this Court, expressive of the common law in Missouri, remained the residence of the minor, Charles Eugene Spurgeon, and the Court of Appeals was in error in failing to follow this Court and in ruling that the minor could legally change his own domicile.

V.

The question of emancipation is discussed at some length by the Circuit Court of Appeals which concludes that the minor was fully emancipated. The District Court, on motion to remand, had before it affidavits, depositions and some oral testimony, and while no formal findings of fact were made by that court, it is readily apparent from the memorandum opinion that the District Court concluded, as a matter of fact, that complete emancipation was not proved by the evidence.

We do not believe that the question of emancipation was necessary to decision, but whether it was or was not, we believe that the Circuit Court of Appeals for the Eighth Circuit erred in brushing aside the factual findings which appear in the memorandum opinion and in holding that the record showed, as a matter of law, that complete emancipation was present. The findings of the District Court were supported by competent, substantial evidence. The findings of the District Court are not clearly erroneous and the Circuit Court of Appeals erred in setting them aside. Rule 52(a), Federal Rules of Civil Procedure.

Prayer.

For the foregoing reasons, amplified and developed in the accompanying brief, your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for

the Eighth Circuit, commanding said court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, that the decision and judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as is proper.

Respectfully submitted,

COWGILL & POPHAM,
A. C. POPHAM,
SAM MANDELL,
PRICE WICKERSHAM,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Opinions Below.

The memorandum opinion on motion to remand delivered by the District Court per Reeves, J., May 27, 1943 (Appendix A), appears at pages 26-32 of the record and is reported at 55 Fed. Supp. 305.

The opinion of the Circuit Court of Appeals, Eighth Circuit, delivered November 6, 1945, per Riddick, J. (Appendix B), appears at pages 52-49 of the record and is reported at 151 Fed. (2d) 762.

Jurisdiction.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Appeals, Eighth Circuit, on writ of certiorari, is invoked under Section 240 (a) of the Judicial Code, as amended June 7, 1934, c. 246, 48 Stat. 926, 28 U. S. C. A. Sec. 347, and Rule 38 of the Supreme Court of the United States as effective February 27, 1939. The opinion of the Circuit Court of Appeals was delivered November 6, 1945 (42), and the petition for rehearing was denied December 3, 1945 (59). This petition for review on writ of certiorari is filed within three months of either date and is therefore timely filed. 48 Stat. 926, 28 U. S. C. A. Sec. 350.

SUMMARY STATEMENT.

January 23, 1943, Charles Eugene Spurgeon, a minor, by next friend, filed his action for damages for false imprisonment against the petitioner, Mission State Bank, in the Circuit Court of Jackson County, Missouri, at Kansas City (2-7). The bank, a Kansas corporation and citizen and resident of that state, in due time filed its petition for removal to the United States District Court (6-8), alleging that plaintiff minor was a citizen and resident of Missouri, so that necessary diversity of citizenship existed. Bond was filed, and an order of removal was entered by the state court (9). Transcript on removal was duly lodged in the District Court (10), and the bank then answered (10-11).

April 16, 1943, plaintiff filed his motion to remand (11-12) in which he alleged that he, as well as the bank, was citizen and resident of Kansas, and that no diversity of citizenship existed between them. The motion was heard before District Judge Reeves. We briefly summarize the testimony before the District Court on the hearing:

Plaintiff Charles Eugene Spurgeon, hereinafter referred to as the minor, was born July 2, 1924. His parents resided near Queen City in Schuyler County, Missouri. His father died in 1926. Six years later his mother remarried, becoming Sarah Catherine Ballanger, and she continued to reside in Schuyler County. In December, 1942, the minor, then about 18 years old, left his mother's home and went to Kansas City, Missouri, to seek employment (15-16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave (17).

On reaching Kansas City, Missouri, the minor took board and lodging at the home of a Mrs. Poindexter. He had no extra clothes with him. He told Mrs. Poindexter he expected to be drafted at any time. He obtained employment at the Dickinson Theatres at Mission, Kansas, a close-in suburb of Kansas City, Missouri, and commuted back and forth until January 10, when he left Mrs. Poindexter's home (25).

January 2, 1943, the minor was arrested while in the bank, and was later released. He claimed that on January 10, 1943, he moved his residence to Mission, Kansas, with the intent to become a citizen and resident of that state (13). He slept in a small, unfurnished room in the theatre building from January 10, 1943, until March of that year when he was inducted (25).

The minor contended that the evidence showed he had been emancipated, so that he was legally capable of acquiring a domicile of choice, separate and apart from the domicile of his parents. The bank contended that under the law of Missouri, no minor, whether emancipated or not, could acquire a domicile of his own choice so long as either parent lived, and, further, that complete emancipation was not shown.

The District Court, in an able memorandum opinion (26-36), 55 Fed. Supp. 305 (Appendix "A"), held that as a matter of fact, complete emancipation was not shown, and ruled that the minor, being *sui non juris*, could not acquire a separate domicile on his choice under the law of Missouri, and the motion to remand was denied (32).

The cause proceeded to trial and plaintiff minor recovered judgment for actual and punitive damages (33-34). His appeal to the Circuit Court of Appeals, Eighth Circuit, in which he complained solely of jurisdiction of the District Court, followed, and that court, in its opinion (42-49) (Appendix B) held that on the record, emancipa-

tion was shown as a matter of law and, ruling the case solely on the authority of foreign jurisdiction, held that the minor was legally capable of acquiring, and had acquired, a separate domicile of his own choice in Kansas, and that no diversity of citizenship existed. The Eighth Circuit reversed the cause with instructions to remand to the state court. After unavailing petition for rehearing (51-58), the bank presents this petition for review of the decision of the Eighth Circuit, on writ of certiorari.

SUMMARY OF ARGUMENT.

I.

The common law of England as of the year 1607 is the common law of Missouri.

Robertson v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279;
Lines Music Co. v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34;
Sec. 645, R. S. Mo. 1939.

II.

The common law of Missouri, as adopted by it, continues to be the common law of that state unless abrogated by statute or constitution.

Robertson v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279;
Lines Music Co. v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34;
Davis v. *Stouffer*, 132 Mo. App. 55, 112 S. W. 282, 286.

III.

Under the common law as adopted and in force in Missouri, the domicile of a minor is the domicile of his parents, and no minor whose parents are living can acquire a separate domicile of his own choice.

Lamar v. *Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751;
Delaware, L. & W. R. Co. v. *Petrowsky*, 162 C. C. A. 570, 250 Fed. 554, Cert. denied 247 U. S. 508, 38 S. Ct. 427, 62 L. Ed. 1241;
Bjornquist v. *Boston & A. R. Co.*, 163 C. C. A. 179, 250 Fed. 929, 5 A. L. R. 951;

Ex Parte Petterson, 166 Fed. 536, 545;
Marks v. *Marks,* 75 Fed. 321, 325, 5 A. L. R. 943, 960;
Wiggins v. *New York Life Ins. Co.,* 2 F. Supp. 365;
Trammell v. *Kansas Compensation Board,* 142 Kans. 329, 46 Pac. (2d) 867;
Modern Woodmen v. *Hester,* 66 Kans. 129, 71 Pac. 379;
Jacobs, "Law of Domicile," (1887) Secs. 229, 231.

IV.

Under the common law as in force in Missouri, even an emancipated minor is without legal capacity to establish a domicile of choice.

Delaware L. & W. R. Co. v. *Petrowsky, supra;*
Gulf C. & S. F. R. Co. v. *Lemons,* 109 Tex. 244, 206 S. W. 75, 5 A. L. R. 943;
Bjornquist v. *Boston and A. R. Co., supra;*
Ex Parte Petterson, 166 Fed. 536;
Jacobs, "Law of Domicile" (1887), Sec. 231.

V.

In ruling the question of the minor's domicile, it was the duty of the Circuit Court of Appeals to decide that issue under the common law of Missouri, and it was error for that court to decide the issue on the law of foreign jurisdictions or "modern authorities" as perceived by that court.

Erie R. Co. v. *Tompkins,* 304 U. S. 64, 58 S. Ct 817;
Magnolia Petroleum Co. v. *Hunt,* 320 U. S. 430, 445, 64 S. Ct. 208, 88 L. Ed. 168.

VI.

The District Court's findings that complete emancipation did not exist are supported by substantial, competent evidence, and it was error for the Circuit Court of Appeals to brush such findings aside, since clear error was not shown.

Hazeltine Corp. v. *General Motors Corp.*, (C. C. A. 3) 131 F. (2d) 34;
Reinstine v. *Rosenfield*, (C. C. A. 7) 111 F. (2d) 892;
Rule 52, Federal Rules of Civil Procedure;
Cleo Syrup Corp. v. *Coca-Cola Co.*, 139 F. (2d) 416, 150 A. L. R. 1056, Cert. denied 64 S. Ct. 638, 321 U. S. 781.

VII.

The petition for writ of certiorari to the Circuit Court of Appeals, Eighth Circuit, should be allowed.

Erie R. Co. v. *Tompkins, supra;*
Magnolia Petroleum Co. v. *Hunt, supra.*

ARGUMENT.

The common law of England was first adopted in Missouri by an Act of the Third Territorial Assembly, approved January 19, 1816, and has been in effect since that date. Missouri's adoption of the common law was re-enacted from time to time and carried forward into what is now Section 645, Revised Statutes of Missouri, 1939, II Missouri Statutes Annotated, page 87. That section reads:

> "The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this state, or the statute laws in force for the time being, shall be the rule of action and decision in this state, any custom or usage to the contrary notwithstanding, but no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that the same may be in derogation of, or in conflict with, such common law, or with such statutes or acts of parliament; but all such acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof. R. S. 1929, Sec. 645."

The Missouri courts have held that the common law of England prior to the fourth year of the reign of James the First, the year 1607, is the common law of Missouri, and remains in force, as adopted, unless changed by statute or constitution. In *Robertson* v. *Jones et al.*, 345 Mo. 826, 136 S. W. (2d) 278, 279, the Supreme Court of Missouri said:

> "It is true the common law of England, so far as it is applicable, is in force in this state except where changed by statute."

In *Lines Music Co.* v. *Holt et al.*, 332 Mo. 749, 60 S. W. (2d) 32, 34, the court said:

> "The common law is the law of our land unless abrogated by statute or constitution."

Changes in the common law of England made after the year 1607 are not binding on or followed by the courts of Missouri, as held by the Kansas City Court of Appeals in *Davis* v. *Stouffer*, 132 Mo. App. 55, 112 S. W. 282. There the plaintiff asserted that she had entered into a valid common-law marriage with Dr. Joseph B. Davis, and brought suit as his widow. The defense contended that in 1844 an authoritative announcement was made by the English courts in the case of *Reg.* v. *Millis*, 10 Clark & Fin. 534, holding that it had never been the common law of England that a marriage could take place except in a limited degree, without being regularly solemnized according to ecclesiastical law; that is, by certain church formalities. This defense was rejected by the Kansas City Court of Appeals, which said (l. c. 286):

> "But *Reg.* v. *Millis* does not state the common law of England as it was understood to be by the courts and Legislatures of this country when it was introduced here. *Dyer* v. *Brannock, supra; Hallett* v. *Collins*, 10 How. (U. S.) 174, 13 L. Ed. 376. It may safely be said that the courts of this country are not under any obligation to follow the mutations of decisions or new views announced in England as to what was the law of that country."

We have therefore established that the common law of England of the year 1607 is the common law of Missouri, that the common law of Missouri cannot be changed except by statute or by constitution, and that mutations in the common law of England made after the year 1607 are of no effect in Missouri and are not binding upon its courts.

Under the common law of England, as adopted in Missouri, a minor could not change his domicile by his own act. The rule is stated by Jacobs in his Law of Domicile (1887) in Section 229:

> "*Domicile of infant cannot be changed by his own act.*—And First, it cannot, at least ordinarily, be changed by his own act. Infants are deemed in law to be wanting in discretion, and, therefore, without capacity to form the intention requisite for the establishment of a domicil of choice. Hence, it results that until they arrive at such age as is deemed by the particular law to which they are subject sufficient for the attribution to them of capacity to choose and act for themselves, they must either retain the domicil which they received at birth, or must depend upon other persons for a change of domicil. Indeed, it has been laid down by a good authority as the undisputed position of all jurists that a minor cannot of his own accord, or—to use the expression of Bynkershoek —*proprio marte,* change his domicil. This is undoubtedly the general rule, and it cannot be said that

there are in the law as understood and administrated in England and America any well-established exceptions."*

No Missouri statute has changed the common law rule. No Missouri courts have ruled the issue here presented and so the rule in Missouri remains the common law rule quoted above and which has found expression in many cases in addition to those cited by Jacobs. Before turning to other cases which announce the rule, we call attention to the fact that in *Lamar* v. *Micou*, 112 U. S. 452, 5 S. Ct. 221, 28 L. Ed. 751, cited by Jacobs, this Court said, l. c. 470:

"An infant cannot change his own domicil."

In *Delaware L. & W. R. Co.* v. *Petrowsky*, 255 Fed. 554, 162 C. C. A. 570, certiorari denied 247 U. S. 508, 38 S. Ct. 427, 62 L. Ed. 1241, the Second Circuit said:

"The law is well established that every person at his birth acquires a domicile of origin, which is that of the person on whom he is legally dependent, which in the case of a legitimate child is that of its father, and in the case of an illegitimate child is that of its mother.

*Citing: *Somerville* v. *Somerville*, 5 Ves. Jr. 750; *Forbes* v. *Forbes*, Kay, 341; *Douglas* v. *Douglas*, L. R. 12 Eq. Cas. 617; *Lanenville* v. *Anderson*, 2 Spinks 41; *Lamar* v. *Micou*, 112 U. S. 452; *Hart* v. *Lindsey*, 17 N. H. 235; *Woodworth* v. *Spring*, 4 Allen 321; *Ames* v. *Duryea*, 6 Lans. 155; *Ex Parte Dawson*, 3 Bradf. 130; *Seiter* v. *Straub*, 1 Demarest 264; *Blumenthal* v. *Tannenholz*, 31 N. J. Eq. 144; *Guier* v. *O'Daniel*, 1 Binn. 349, Note; *School Directors* v. *James*, 2 Watts & S. 568; *Re Lower Oxford Township Election*, 11 Phil. 641; *Harkins* v. *Arnold*, 46 Ga. 656; *Metcalf* v. *Lowther's Ex'rs*, 56 Ala. 312; *Mears* v. *Sinclair*, 1 W. Va. 185; *Hiestand* v. *Kuns*, 8 Blackf. 345; *Warren* v. *Hofer*, 13 Ind. 169; *Maddox* v. *The State*, 32 Id. 111; *Freeport* v. *Supervisors*, 41 Ill. 495; *Rue High, Appellant*, 2 Dougl. (Mich.) 515; *Allen* v. *Thomason*, 11 Humph. 536; *Grimmett* v. *Witherington*, 16 Ark. 377; *Johnson* v. *Turner*, 29 Id. 280; *Powers* v. *Mortee*, 4 Am. L. Reg. 427; *Hardy* v. *De Leon*, 5 Tex. 211; *Russell* v. *Randolph*, 11 Id. 460; *Trammell* v. *Trammell*, 20 Id. 406; Phillimore, Dom. loc. cit.; Dicey, Dom. p. 106; Story, Confl. of L., Sec. 46; Pothier, Intr. Aux. Cout. d'Orleans, No. 16.

"The general rule is also well established that a person while a minor, being *non sui juris,* cannot change his or her domicile."

In *Marks* v. *Marks,* 75 Fed. 321, 325, the Court said:

"Infants cannot change their own domicile. Their domicile is that of their parents. If the father be living the domicile of an infant and that of its mother follow the domicile of the father, unless the husband and wife be separated. After the death of the father the domicile of the infant is that of the mother."

In *Bjornquist* v. *Boston & A. R. Co.,* 250 Fed. 929, 163 C. C. A. 179, 5 A. L. R. 951, the Court said:

"It is undoubtedly true that the general rule is that a minor is incapable of changing his domicile and acquiring a new one during his minority; that he has the domicile of his father if living, and if he is dead, that of the mother, etc. * * *

"The reason stated for the general rule is that a minor is *non sui juris,* which, no doubt, as here applied, means that a person who is under the power and authority of another possesses no right to choose a domicile. *Hart* v. *Lindsey,* 17 N. H. 235, 43 Am. Dec. 597. Under the common law the father is the natural guardian of the minor, and entitled to his custody and control until he reaches majority; and the same is true of the mother (the father having died)."

The opinion of the Circuit Court of Appeals, Eighth Circuit, conflicts with all the above cases.

We have thus established that at common law, a minor could not acquire a domicile of choice so long as either parent lived. We come now to the question of emancipation, and the effect, if any, of emancipation on the minor's

right to acquire a domicile of choice at common law. Before the District Court, and again before the Circuit Court of Appeals for the Eighth Circuit, the respondent contended that he had been completely emancipated and was therefore capable of acquiring a domicile of choice. We contended that the question of emancipation need not be considered, because at common law no minor, not even an emancipated minor, could acquire a domicile of choice.

Jacobs, in his Law of Domicile, Section 231, states:

> "The rule of disability has, in this country, been frequently stated, probably from an abundance of caution, as applicable to *unemancipated* minors, and in settlement cases it has been held that an emancipated minor may acquire a settlement for himself. But the latter doctrine is a legacy of the English law of pauper settlements into which the doctrine of domicil does not enter, and which rests upon its own peculiar grounds, largely statutory. These cases are therefore not authorities even for the doctrine that an emancipated minor may change his municipal domicil; much less can they have any weight in determining the question of his capacity to change his national or *quasi*-national domicil. Emancipation, as understood in this country, relates mainly to the right of the minor to acquire a settlement for himself, and to his right to receive and dispose of his own earnings, and is not to be understood to clothe him with any legal capacity, except such as is actually necessary for his maintenance and protection, and, if married, for the maintenance and protection of his family."

This is the common law rule which is in effect in Missouri, since no Missouri statute has changed it and since no Missouri court has ruled otherwise. This rule has found expression in *Delaware L. & W. R. Co.* v. *Petrowsky, supra,* where the Second Circuit held that an emancipated minor could not acquire a new domicile. To the same

effect is *Gulf C. & S. F. R. Co.* v. *Lemons, supra.* See also, *Bjornquist* v. *Boston & A. R. Co., supra,* and *Ex Parte Petterson,* 166 Fed. 536.

We have therefore established that under the common law as adopted and in force in Missouri, no minor whose parents are living can acquire a domicile of choice. The Circuit Court of Appeals for the Eighth Circuit recognized that the common law rule had not been changed in Missouri, because it says in its opinion: "There are no Missouri decisions directly on the point." Since no Missouri decisions have changed the common law rule, the common law rule remains the law of Missouri, because, as said in *Davis* v. *Stouffer, supra*:

> "It may safely be said that the courts of this country are not under any obligation to follow the mutations of decisions or new views announced in England as to wha twas the law of that country."

This pronouncement was by the Kansas City Court of Appeals, one of the courts of last resort in Missouri. If changes made in England to the common law of England cannot affect the common law of Missouri, then, by the same reasoning, changes in the common law made by other states or by federal courts in the common law, cannot change the common law of Missouri. The common law is and remains as it was, in Missouri.

In our case, the Circuit Court of Appeals concedes in its opinion that it does not decide our case under the common law of Missouri. It concedes that it decides our case on what it terms "modern authorities," on departures from the common law of Missouri, not as yet sanctioned by any Missouri courts. In so deciding our case, the Circuit Court of Appeals refused and failed to apply the common law of Missouri as we have shown it

to be, and so fell into grave error, error which has been condemned by this Court in the very recent cases of *Erie R. Co.* v. *Tompkins,* and *Magnolia Petroleum Co.* v. *Hunt.*

In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, certiorari was granted on the very ground for which we here contend, that the Circuit Court of Appeals disregarded the common law rule of Pennsylvania, which was applicable, in reaching its decision. This Court said:

> "Because of the importance of the question whether the Federal Court was free to disregard the alleged rule of Pennsylvania common law, we grant certiorari (l. c. 71).
>
> * * * * * * *
>
> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state (l. c. 78).
>
> * * * * * * *
>
> "The Circuit Court of Appeals ruled that the question of liability is one of general law; and on that ground declined to decide the issue of state law. As we hold, this was error, the judgment is reversed, etc." (l. c. 80.)

To the same effect is *Magnolia Petroleum Co.* v. *Hunt,* 320 U. S. 430, 64 S. Ct. 208, 88 L. Ed. 168, in which this Court said:

> "The law of a state is embodied as well in its common law rules as in its statutes. * * * The extent to which it shall apply in its own courts a rule of law of another forum is itself a question of local law of the forum." (l. c. 445.)

The Circuit Court of Appeals for the Eighth Circuit fell into the exact error which was recognized in *Magnolia.*

It did not apply the common law of Missouri. It did not even apply the general law. It applied a departure from the common law and from the general law by deciding the case on "modern authorities," authorities which have not as yet been recognized by the Missouri courts. Whether or not those authorities are to receive recognition in Missouri is a matter solely for the courts of Missouri, and we respectfully urge that the Circuit Court of Appeals committed plain error in undertaking to forecast changes in the common law of Missouri which it believed those courts would make, and we urge that the Circuit Court of Appeals was in error in changing the common law rule of Missouri, as it does by its opinion.

Plain error has been committed against your petitioner. The same important question is here present as was present in *Erie R. Co. and in Magnolia Petroleum Co., supra.* Not only is the question of the application of local law important, but the question of jurisdiction is also present and constitutes an additional important reason for allowance of the writ for which we respectfully pray.

We have shown above that under the common law as in force in Missouri, even an emancipated minor cannot acquire a domicil of choice. We did not think the question of emancipation was material to decision below, but it was tendered by respondent, and the District Court, in its opinion (Appendix "A") found, as a matter of fact, that complete emancipation was not shown. The Circuit Court of Appeals brushed aside this finding and held that the record showed complete emancipation as a matter of law.

We shall here seek to show that in so ruling, that court disregarded not only the common law of Missouri, but a statute of our state.

As early as 1887, Jacobs, in his "Law of Domicil," Sec. 231, *supra,* noted that the courts were even then being troubled by the term "emancipation," and states:

> "Emancipation, as understood in this country, relates mainly to the right of the minor to acquire a settlement for himself, and to his right to receive and dispose of his own earnings, and is not to be understood to clothe him with any legal capacity except such as is actually necessary for his maintenance and protection, and, if married, for the maintenance and protection of his family."

That Jacobs properly defined "emancipation," and its effect, as used in this country, is born out by latest authority, viz:

27 Amer. Jur., Infants, p. 749:

> "The fact that an infant's father has emancipated him by giving up his right to the infant's services does not affect the validity of the infant's contracts or liabilities, with the exception of the infant's liability for necessaries furnished to him. Moreover, except for the effect of marriage as an emancipation upon the parent's rights to the infant's earnings and the parent's duty of support and except for the infant's liability for necessaries, the marriage of an infant does not affect the status of infancy or the disabilities incident thereto, including the infant's incapacity to make a contract which is not voidable."

Judge Reeves, an able Missouri lawyer, who formerly graced its Supreme Court, and who has graced the federal bench in Missouri for over twenty years, thoroughly familiar with Missouri law, in his study of the case noted

the difficulty which courts were having with "emancipation," saying:

> "It appears that the courts have been disposed to use the word 'emancipation' in relation to those cases where the parent sought to claim the wages of the minor. The word as a rule has been ineptly used."

The Circuit Court of Appeals used the word "emancipation" ineptly and contrary to its common law meaning and usage. This is proven by the fact that the Circuit Court of Appeals, while relying on the rule announced in Sec. 31, Restatement of Conflict of Laws, completely overlooked the limitation placed on the rule by the authors, in their definition of "emancipation," the true meaning, and the only meaning to be used in relation to change of domicil. The Restatement says, Rule 31, Comment (A):

> "An emancipated child, for the purposes of this section, means a child arriving at years of discretion, whose legal relations with his parent arising out of tutelage have been completely dissolved by the law of their domicil. The determination of the circumstances under which a child is emancipated is not within the scope of the restatement of this subject."

The crux of the definition is "legal relations with his parent arising out of tutelage." Tutelage is the common law right of the parent to the care and custody of his child.

Far from impairing that common law right, Missouri has reaffirmed and implemented it through Secs. 374, 375, R. S. Mo. 1939, l. M. R. S. A., p. 674, 681.

By Section 374, it is provided that:

> "all persons of the age of 21 years shall be considered of full age for all purposes • • • and until

that age is attained, they shall be considered minors; * * *."

Section 375 provides:

> "* * * the father and mother, with equal powers, rights and duties, while living, and in the case of the death of either parent, the survivor * * * shall be the natural guardian * * * of their children, and have the custody and care of their persons, education and estates; * * * The parents of such minor child * * * acting as such natural guardian * * * shall be entitled to receive and collect the earnings of such minors until they reach their majority and be liable for their support to the extent of such earnings; * * *."

Under this law, Judge Reeves said, it is held without exception that the natural guardian or a minor is entitled to the custody and care of such minor unless it be established that the parent is incompetent or unfit to have the custody and exercise control over him, citing *In re Smith,* 197 Mo. App. 200, l. c. 205; *State ex rel.* v. *Tincher,* 258 Mo. 1, l. c. 13, 166 S. W. 1028.

Missouri has no statutes which provide for emancipation of minors. Therefore, there can be no complete emancipation of minors in Missouri, as that term is properly to be used and understood on the question of the domicile of a minor, because the legal relations with the parent arising out of tutelage cannot be destroyed while minority continues and while the parent is fit and competent to care for the minor.

Judge Reeves reaches the same conclusion. He discusses a number of Missouri cases which deal only with the right of a minor to his own wages, or the liability of a parent for necessities furnished to a minor who has left home, cases in which the term "emancipation"

is used, as in 27 Amer. Juris., *supra,* but which are not cases of true emancipation and which Judge Reeves concludes are cases in which only limited manumissions are shown. All of the Missouri cases on the subject referred to in the opinion of the Circuit Court of Appeals are likewise cases of limited manumissions only and not cases holding that complete emancipation can or does exist in Missouri.

It is conceded that respondent is a minor. The record shows that his mother is his sole surviving parent. The record does not show that she is an unfit person to have the care, custody and control of the minor. By common law of Missouri, and by statute of Missouri, the relationships of parent and child arising out of tutelage continue as a matter of law on this record.

We respectfully urge that the Circuit Court of Appeals erred in holding that complete emancipation was shown as a matter of law on the record, because the Missouri law knows no such complete emancipation. Ineptly using the term "emancipation," the court ruled this issue on the law of foreign jurisdictions and was in error, as held in *Erie R. Co.* v. *Tompkins* and *Magnolia Petroleum Co.* v. *Hunt, supra,* and further ground for allowing the writ of certiorari prayed for appears.

In the preceding section of this brief, we pointed to the true meaning of "emancipation" as here involved, appearing in the Restatement of Conflict of Laws:

> "An emancipated child, for the purpose of this section, means a child arriving at years of discretion, whose legal relation with his parents arising out of tutelage have been completely dissolved by the law of their domicile."

The Missouri courts have said, *Brosius* v. *Barker*, 154 Mo. App. 657, l. c. 662:

> "Complete emancipation is an entire surrender of all rights to the care, custody and earnings of the child, as well as a renunciation of parental duties. • • • And the test to be applied is that of the preservation or destruction of the parental and filial relations."

Such a renunciation must be voluntary and must be intended, because the courts have held that in determining whether a child has been emancipated, the intention of the parent governs.

Donk Bros. Coal Co. v. *Retzloff*, 229 Ill. 194;
Evans v. *K. C. Bridge Co.*, 212 Mo. App. 101, 247 S. W. 213;
Memphis Steel Const. Co. v. *Lister*, 138 Tenn. 307, 197 S. W. 902, L. R. A. 1918 B 406;
46 C. J., p. 1342, Parent and Child, Secs. 190, 192.

With these principles before us, we approach the record. The minor respondent left home without taking any extra clothes or his belongings with him, to find work at Kansas City. He had registered for the draft and was about to be inducted (16). His mother had nothing to do with his leaving home, she did not ask him to leave, nor did she want him to leave home (17). After leaving, her son kept writing to her (18-20).

On this evidence, it is clear from the memorandum opinion filed in the case by Judge Reeves, that there was no destruction of the parental and filial relations. The District Court so found. The mother did not consent to the boy's leaving home. The District Court so found. If she did not consent to his leaving home, and did not want him to leave home, and did not ask him to leave home,

then she did not intend to emancipate the boy. It is clear that she did not intend that the maternal and filial relations be destroyed.

Judge Reeves did not make or file any separate findings of fact, as such, but his memorandum opinion shows that he found the above facts and that he found, as a matter of fact, that complete emancipation was not shown by the record. Since his opinion clearly indicates the basis for the court's decision, the opinion may be treated as findings of fact, under the authority of *Hazeltine Corp.* v. *General Motors Corp.*, (C. C. A. 3) 131 F. (2d) 34.

The evidence to which we have pointed clearly substantiates the District Court's finding and no clear error appears, and so, the Circuit Court of Appeals erred in setting aside the court's finding. Rule 52(A), Federal Rules of Civil Procedure; *Reinstine* v. *Rosenfield,* (C. C. A. 7) 111 F. (2d) 892.

Conclusion.

We believe we have shown, by applicable authority, that the Circuit Court of Appeals for the Eighth Circuit failed to rule the issue of domicile according to the common law of Missouri, and so, under the holding of *Erie R. Co.* v. *Tompkins,* an important question has arisen and for which the jurisdiction of this Court may be invoked under Rule 38 of this Court. The opinion of the Circuit Court of Appeals also conflicts with the holding of this Court in *Magnolia Petroleum Co.* v. *Hunt.* The opinion of the Circuit Court of Appeals conflicts with the holding of this Court in *Lamar* v. *Micou.* The opinion is in conflict with *Delaware, L. & W. R. Co.* v. *Petrowsky,* by the Circuit Court of Appeals, Second Circuit, on the same subject matter. We sincerely believe that grave error has been committed against petitioner and we

respectfully urge that the importance of the questions involved, and the clear error shown, justify the allowance of the writ of certiorari for which we pray.

Respectfully submitted,

COWGILL & POPHAM,
A. C. POPHAM,
SAM MANDELL,
PRICE WICKERSHAM,
2806 Fidelity Bldg.,
Kansas City, Mo.,
Counsel for Petitioner.

APPENDIX "A."

(Memorandum Opinion on Motion to Remand.)

The question for decision in this case is whether the plaintiff, a minor nearly nineteen years of age, was capable under the law of choosing a residence or domicile different from that of his parents. If so, and if a choice had actually been made, then a diversity of citizenship does not exist and the case should be remanded to the court of its origin. Otherwise, jurisdiction should be retained.

The minor's mother and stepfather reside in Queen City, Schuyler County, Missouri. The minor formerly [fol. 27] resided with them at that place. His father died in 1926. His mother remarried in 1932. In the latter part of the year 1942 the minor left home for the purpose of seeking employment. There was no evidence of a breach of good will, affection and devotion between his mother and himself. Moreover, his relations with his stepfather did not lack cordiality. He left home with the idea of returning but in the meantime he expected to find employment and personally to receive the rewards of his labor. His mother, by deposition, testified that he left home "'to make his own way in the world," yet it was without her consent, as she testified, "I didn't want him to leave." After leaving home he wrote several letters to his mother wherein he related his experiences and how he was getting along. His letters were affectionate and filial. For a brief period he resided in Kansas City at a boarding house but later moved to Mission, Kansas, where he had obtained employment. He lived at a place where he was employed. He was inducted into the military service and all his statements and acts in-

dicated a purpose to return to his place om employment at Mission, Kansas. His employer had indicated a reemployment at the end of his military service.

Upon the foregoing facts, the defendant contends that, being a minor, he was not competent to determine the place of his residence or domicile and for the purposes of this action his residence or domicile was that of his mother and father. These contentions will be noticed.

1. By Section 374, R. S. Mo. 1939, it is provided that: "all persons of the age of 21 years shall be considered of full age for all purposes * * * and until that age is attained they shall be considered minors; * * *."

There are exceptions to this statutory rule of minority [fol. 28] not applicable here. Section 375, R. S. Mo. 1939, provides who shall be the natural guardians of minors. The provision is that: "* * * the father and mother, with equal powers, rights and duties, while living, and in the case of the death of either parent, the survivor * * * shall be the natural guardian * * * of their children, *and have the custody and care of their persons, education and estates;* * * *. The parents of such minor child * * * acting as such natural guardian * * * *shall be entitled to receive and collect the earnings of such minors,* until they reach their majority, and be liable for their support to the extent of such earnings; * * *."

Under this law it is held without exception that the natural guardian of a minor is entitled to the custody and care of such minor unless, of course, it be established that the parent is incompetent or unfit to have the custody and exercise control over him. *In re Smith,* 197 Mo. App. 200, l. c. 205; *State ex rel.* v. *Tincher,* 258 Mo. 1, l. c. 13.

In the case of *Waters* v. *Gray*, 193 S. W. 33, l. c. 35, the St. Louis Court of Appeals succinctly declared the law, when it said:

> "* * * And while the parents have a right, by nature and by law, to the custody of children, which right should never be denied, except for the most cogent reasons, yet whenever such occasions arise, and such occasions arise, not alone by reason of the lewdness, immorality or dissipation of the parents, or either of them, but whenever conditions are shown to be such that to continue the custody of the child with the parents, or either of them, would be contrary to the permanent well-being of the child, then that natural right of the parent must give way, for this natural right of guardianship is less paramount than the life, health, or morals of the child."

There is no evidence in this case that the minor's mother is not entirely competent and worthy of maintaining her custody and control over the life of the minor. There is no pretense that she is unworthy. Under the law such [fol. 29] rights should not be denied her "except for the most cogent reasons." Even by the common law, a surviving parent, if fit, has the right to the custody of the child. 46 C. J., Sec. 9, p. 1224.

2. It is contended by the minor, through his counsel, that he has been completely emancipated so that he is entitled to choose his own domicile. Reliance is placed upon the evidence of his mother, that, when he left, it was to make his own way. In the same deposition she testified that she did not want him to leave. Moreover, all his letters to his mother indicate that the relations of mother and son were not abrogated, nor do such communications breathe any suggestion of emancipation. The fact that he was permitted to work and draw his own compensation did not signify emancipation.

The cases cited and discussed by counsel relate to those cases where the parent had merely granted a license to the minor to work for wages and draw his own compensation. In the case of *Brosius* v. *Barker*, 154 Mo. App. 657, l. c. 663, the Springfield Court of Appeals declared the rule when it said that "emancipation is never presumed, and if relied upon as a defense, must be proven." The court further said that, without declaring general rules, "we hold that where the child who is physically and mentally able to take care of himself, has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him." That rule may be implied from the statute which devolves upon the parents the duty to support the minor "to the extent of such earning" when collected by the parents. In the Brosius case the court was considering the liability of the father for medical attention to the son where the son had been permitted to draw his own wages. At page 662 [fol. 30] the court indicated what constitutes complete emancipation as follows:

> "Complete emancipation is an entire surrender of all the rights to the *care, custody* and *earnings* of the child, as well as a renunciation of parental duties. * * * And the test to be applied is that of the preservation or destruction of the parental and filial relations."

No one could say that in this case, upon the evidence, there was a "destruction of the parental and filial relations." On the contrary, such relations continued to exist as indicated by the letters of the minor to his mother.

Moreover, the court, on the same page defined "implied emancipation" as follows:

> "* * * Implied emancipation is where the parent, without any express agreement by his acts or conduct, impliedly consents that his infant child may leave home and shift for himself. * * *."

It cannot be successfully urged that the conduct of either the minor or his mother indicated such consent. Although the mother did say that her son intended to go out and make his own way, this was against her consent.

In *McMorrow* v. *Dowell*, 116 Mo. App. 289, l. c. 298 (90 S. W. 728, l. c. 733) the court discussed the question of emancipation but it extended no further than the right of an employer to give employment to a minor and pay him without becoming liable to the parents. The court said:

> "* * * If a parent knows a child is working for stipulated wages, or in expectation of payment; knows, too, that the employer and the child understand payment is to be made to the child, and interposes no objection, these circumstances are evidence for the inference that the parent's right was waived. * * *."

The court was inclined to designate this as a limited emancipation, rather than a mere license. It appears that the courts have been disposed to use the word "emancipation" in relation to those cases where the parent sought to claim the wages of the minor. The word as a rule has been ineptly used. Very young children [fol. 31] are frequently permitted to seek employment, draw their wages and use it for their own spending money. It would be idle to say that this signifies emancipation and that the parents lost control and custody of the children and that they were at liberty to choose their own domicile.

In *Woodward* v. *Donnell,* 146 Mo. App. 119, l. c. 126, the court discussed the question of the right of the minor to collect his wages and referred to the right as one of emancipation rather than a mere license. In the case of *Evans* v. *Kansas City Bridge Co.,* 213 Mo. App. 101, the Kansas City Court of Appeals collated the law on the subject of parental rights over children employed away from home. That was merely a case of emancipation in relation to earnings although recovery was denied to the father on the usual grounds that he did not support the minor and therefor was not entitled to maintain suit for the death of his minor son.

In the very early case of *Ream* v. *Watkins,* 27 Mo. 516, the Supreme Court ruled that under the circumstances there given the minor son was entitled to draw his own wages, but that it was the right of the father at his pleasure to resume his authority over the minor son, including his earnings. There could not be complete emancipation under such circumstances and obviously the son could not choose his own domicile.

In the case of *Dierker, Etc.,* v. *Hess,* 54 Mo. 246, Judge Sherwood of the Missouri Supreme Court expressed the rule admirably in upholding the right of the son to receive wages and acquire property on his own account even though residing with his parents. Again, the fact did not clothe the son with the power to select his own domicile. It was a limited manumission while yet a member of the father's household.

3. Aside from the foregoing discussion the courts have held that a person, while a minor, but being *non sui juris,* cannot choose or change his domicile. That [fol. 32] was the ruling in *Delaware L. & W. R. Co.* v. *Petrowsky,* 250 Fed. 554. In that case the court said, with reference to the right of the parent to change the domicile of the

child, it depended upon "the parent's right to the custody of the child."

In the case at bar no one will contend that the mother did not have the right under the law to the custody and control of her son or that she had ever relinquished that right, but, even if so, it was within her power to reclaim it. While that power existed the son could not establish a residence *animus manendi*, for the reason that his mother had it within her power to determine the place of his residence.

In *Wiggins* v. *New York Life Ins. Co.*, 2 Fed. Supp. 365, the court held, "but even if he was emancipated this gives him no power to change his domicile."

An identical ruling was made by one of the judges in *Ex Parte Petterson*, 166 Fed. 536, l. c. 546, the court said:

> "* * * Applying the common law rule to this case, the petitioner did not reach her majority until the first day of December, 1906; prior to that time she was an infant incapable of choosing a domicile for herself, and up to that time her domicile had been that of her parents * * *."

It is not necessary to multiply the authorities. The rule is that a fit and upright parent is entitled to the care, custody and earnings of a minor child. This right continues until the minor has attained his majority. Until that right has been extinguished the minor cannot choose his domicile even though in the meantime a measure of manumission or emancipation is granted in respect of his earnings.

In view of the foregoing, the motion to remand should be overruled, AND IT IS SO ORDERED.

ALBERT L. REEVES,
United States District Judge.

APPENDIX "B."

Before WOODROUGH, JOHNSEN, and RIDDICK, Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the court.

The appellant, a minor, brought this action in a Missouri State court against the appellee, a Kansas bank engaged in business at Mission, Kansas. The bank removed the action to a Federal court in Missouri on the ground of diversity of citizenship. Appellant's motion to remand was denied. A trial in the District Court resulted in a judgment in favor of appellant. This appeal raises only the question of the jurisdiction of the Federal court. Jurisdiction depends upon whether the minor appellant was, under the facts in this case, capable of acquiring a domicile of his choice, and upon whether his domicile was in Kansas at the times material on the question for decision.

The facts are not in dispute. Appellant's mother and stepfather resided and maintained their home near Queen City in Schuyler County, Missouri. Until shortly before the present action was brought, the appellant lived with his parents, although for three and one-half years the greater part of his time had been spent away from their home. In December, 1942, when appellant had attained the age of eighteen years and five months, he left the home of his parents, with their consent, to make his way in the world. He had no definite destination in mind. It was understood by him and his parents that he left for the purpose of securing permanent employment wherever it might be found. At the time of his departure from home appellant had finished two years of high school, had spent one year in a Civilian Conservation Camp, and for many years had been accustomed to work for others for compensation. His reputation for industry and integrity was good.

On leaving the home of his parents, appellant went to Kansas City, Missouri, where he remained until he secured employment in a moving picture theatre in Mission, Kansas. He then removed to Mission, as he testified on the motion to remand, for the purpose of making that place his permanent home, and with a view to becoming a citizen of Kansas. Appellant resided continuously in Mission from the time of his removal there in January, 1943, until he was called into the army in March, 1943. Throughout that period he remained in the employ of the moving picture theatre. Shortly after his removal from Kansas City, Missouri, to Mission, Kansas, he wrote his mother requesting her to send him such of his personal belongings as he had not taken with him on his departure from home, accompanying his letter with money to pay the necessary transportation charges. In a letter to his mother after his entrance into the army, he wrote that his employer in Mission, Kansas, had promised to re-employ him on his discharge from the army, and that the many friends he had made in Mission assured him that he might have a home there as long as he desired. He also advised his mother that he had not maintained communication with his acquaintances in Queen City, Missouri, and that the only persons he missed in the army were the friends he had made in Mission.

Thirteen days after appellant had moved from Kansas City to Mission, this action was brought in the Missouri State court to recover damages which appellant claimed to have sustained as the result of his alleged false arrest and imprisonment by the bank. Appellant's contention is that the facts stated show that he had been completely emancipated by his parents; that, as an emancipated minor, he was capable of selecting a domicile of his choice; and that at all times important to decision here he was resident of Kansas, which is also the residence of the appellee bank.

Whether the appellant was an emancipated minor at the time of his departure from the home of his parents is a question controlled by Missouri law. Under Missouri law, emancipation of a minor need not be evidenced by any formal contract. Direct proof is not required. The emancipation of a minor is never presumed. The party relying upon it must establish it. *Brosius* v. *Barker*, 154 Mo. App. 657, 136 S. W. 18; *Singer* v. *St. Louis, K. C. & C. Ry. Co.*, 119 Mo. App. 112, 95 S. W. 944. As against his parents an emancipated minor is entitled to the fruits of his labor and compensation for personal injuries (*Beebe* v. *Kansas City*, Mo. App. 17 S. W. (2d) 608, 612), upon the principle that emancipation is the renunciation of parental duties to the minor and a surrender of the parents' right to the minor's services. See also *Ream* v. *Watkins*, 27 Mo. 516; *Dierker* v. *Hess*, 54 Mo. 246, where it is held that where a minor is permitted to work for himself and claim and enjoy his own wages, he may purchase and own property independent of his parents' control, even when he continued to live in his father's home; and *Evans* v. *Kansas City Bridge Co.*, 213 Mo. App. 101, 247 S. W. 213, in which a father was held not entitled to recover past wages paid his deceased minor son, where the father had not performed his correlative parental duties entitling him thereto.

"Generally the father, as head of the family, is entitled to the services of his minor children, or to their earnings, if by his permission they are employed by others. He is also under obligation to support his children during their minority. The right and obligation are correlative, and where the father neglects or refuses to support his child, denies him a home, or abandons him, so that he is obliged to support himself, the law implies an emancipation, and recalls the father's right to the child's services and earnings." *Swift & Co.* v. *Johnson*, 8 Cir., 138 Fed. 867, 872-

873. This case involved an action to recover for the death of a minor, prosecuted for the benefit of the father who had abandoned the child. The court reached the conclusion that there had been an emancipation of the minor and recovery could only be for nominal damages.

A leading Missouri case upon the question under consideration is *Brosius* v. *Barker, supra,* in which the court held that where a minor "who is physically and mentally able to take care of himself, has voluntarily abandoned the parental roof and turned his back to its protection and influence, and has gone out to fight the battle of life on his own account, the parent is under no obligation to support him." The case involved an action against a father to recover the cost of medical and hospital treatment for his minor son who had left his home in Missouri to make his way in the world. The action was defended on the ground that the minor had been emancipated and that the father was not liable. In discussing the question of emancipation the court said (136 S. W. 19-20):

> "The general rule is that the father is under a legal obligation to maintain and support his infant child. The child comes into the world absolutely helpless and incapable of protecting itself. No creature is more helpless at birth than the human being, yet in some jurisdictions the courts hold that parents who have bestowed life, and have brought into the world these helpless creatures, are under no legal obligation to support or preserve them during the dependent period of their existence. *Kelley* v. *Davis,* 49 N. H. 187, 6 Am. Rep. 499; *Gordon* v. *Potter,* 17 Vt. 348. But the great weight of modern authority repudiates this doctrine and declares it to be opposed to natural sense of justice. *Huke* v. *Huke,* 44 Mo. App. 308; *Porter* v. *Powell,* 79 Iowa, 152, 44 N. W. 285, 18 Am. St. Rep. 353, 7 L. R. A. 176; *Guthrie* v. *Conrad,* 133 Iowa 171, 110 N. W. 454; *Rounds Bros.* v. *McDaniel,*

133 Ky. 669, 118 S. W. 956; *Ream* v. *Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Philpott* v. *Railroad*, 85 Mo. 164; *Mott* v. *Purcell*, 98 Mo. 247, 11 S. W. 564; 29 Cyc. 1675; *Johnson* v. *Gibson*, 4 E. D. Smith (N. Y.) 231; *Ramsey* v. *Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A., 682; *Kubic* v. *Zenke*, 105 Iowa 269, 74 N. W. 748; *Gotts* v. *Clark*, 78 Ill. 229.

"Complete emancipation is an entire surrender of all the rights to the care, custody, and earnings of the child, as well as a renunciation of parental duties. *Lowell* v. *Newport*, 66 Me. 78. And the test to be applied is that of the preservation or destruction of the parental and filial relations. *Sanford* v. *Lebanon*, 31 Me. 124.

"There are two kinds of emancipation, express and implied. Express emancipation takes place when the parent agrees with his child, who is old enough to take care of and provide for himself, that he may go away from home and earn his own living, and do as he pleases with the fruits of his labor. Implied emancipation is where the parent, without any express agreement by his acts or conduct, impliedly consents that his infant child may leave home and shift for himself. *Rounds Bros.* v. *McDaniel, supra; Lowell* v. *Newport, supra.*

"Emancipation was in early time evidenced and perfected by the formality of an imaginary sale. Subsequently this was abolished, and the simple process of manumission before a magistrate substituted. *Everett* v. *Sherfey*, 1 Iowa 358. In Louisiana the matter is expressly regulated by statute. But in the absence of statute the rule now is that emancipation need not be evidenced by any formally executed instrument, or by any record act, but is a question of fact which may be proven from circumstances, and direct proof is not required. *Canovar* v. *Cooper*, 3 Barb. (N. Y.) 115; *Benson* v. *Remington*, 2 Mass. 115; *Everett* v. *Sherfey, supra.*

"The question of emancipation must be determined upon the peculiar facts and circumstances of each

> case, and nothing more than general rules can be declared which will be applicable in all cases. *Inhabitants of Carthage* v. *Inhabitants of Canton,* 97 Me. 473, 54 Atl. 1104. Emancipation is never presumed, and, if relied upon as a defense, must be proven. *Singer* v. *Railroad,* 119 Mo. App. 112, 95 S. W. 944."

The District Court based its finding that the appellant was not emancipated upon the statement made by his mother in her deposition, read on the motion to remand, that she did not want the appellant to leave home; but, when the whole deposition is read, it is clear that whatever her wishes were she consented to the son's departure from the parental roof to make his way in the world. This is also the only conclusion that can be drawn from the testimony of the stepfather. It was, of course, natural that appellant's mother should have preferred him to remain at home with her, but, so long as she agreed with her son that he might leave to make his own way in the world, her natural preference is not significant on the question of his emancipation. It is important to note that there was nothing in the agreement between the parents and the son in this case which in any way limited the son in the choice of his place of residence. He was free to go where he wished, and, if capable of making a choice, to acquire a new domicile when and where necessary or convenient to the success of his effort to make his own way and to support himself. Implied in this agreement between the minor and his parents was a complete renunciation of the parental right to control the minor's domicile.

Since appellant was emancipated by an agreement between himself and his parents, the questions remain whether, as an emancipated minor, he was capable of acquiring a domicile of his choice, and whether, in fact and law, appellant did acquire a domicile in Kansas. Clearly, both

questions must be answered in the affirmative. The appellant in this case had reached an age of discretion, and established his competence to care for himself before he departed from the home of his parents. In such circumstances, modern authorities, preferring reality to fiction, sustain the right of an emancipated minor to acquire a domicile of his choice. "An emancipated child can acquire a new domicile of choice. Since he has to provide for himself, he should have power to choose his home." Restatement of Conflict of Laws, § 31. To the same effect, 1 Beale, Conflict of Laws, §§30.1, 31.1; Goodrich on Conflict of Laws, § 34; Dobie, Federal Procedure, p. 191. See also 30 Columbia Law Review 703. There are no Missouri decisions directly on the point. On principle, however, the Missouri cases cited above point to agreement with the modern rule.

The cases in other States are in conflict. Where the right of an emancipated minor to select a domicile of his choice is denied, decision is usually based on the fact that a minor, being *non sui juris,* is legally incapable of effecting a change of domicile. Cases so holding are *Gulf, C. & S. F. R. Co.* v. *Lemons,* 109 Tex. 244, 206 S. W. 75, 5 ALR 943; *Delaware, L. & W. R. Co.* v. *Petrowsky,* 2 Cir., 250 Fed. 554; and *Wiggins* v. *New York Life Ins. Co.,* 2 Fed. Supp. 365. Cases recognizing the rights of the minor are *Bjornquist* v. *Boston & A. R. Co.,* 1 Cir., 250 Fed. 929, 5 ALR 951; *Woolridge* v. *McKenna,* C. C. Tenn., 8 Fed. 650; *Russell* v. *State,* 62 Neb. 512, 87 N. W. 344; and *Cohen* v. *Del. L. & W. R. Co.,* 269 N.Y.S. 667. The cases are noted in 5 ALR 949. As stated in Goodrich on Conflict of Laws, §34(b), recognition of the right of an emancipated minor to choose a domicile "merely gives legal effect to what is already the fact."

Unquestionably, the minor in this case acquired a domicile in Kansas. To acquire a domicile of choice, the law requires the physical presence of a person at the place of the domicile claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicile is instantaneous. Intention to live permanently at the claimed domicile is not required. If a person capable of making his choice honestly regards a place as his present home, the motive prompting him is immaterial. Restatement of Conflict of Laws, §§15, 22.

The judgment of the District Court is reversed with directions to remand this action to the State court.